

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DENNIS KUZMIC)	
Claimant)	
)	
VS.)	
)	
STAPLES, INC.)	
Respondent)	Docket No. 1,052,151
)	
AND)	
)	
INDEMNITY INS. CO. OF N. AMERICA)	
Insurance Carrier)	

ORDER

Both parties requested review of the December 30, 2011 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on April 3, 2012. Workers Compensation's Director appointed Jeffrey E. King of Salina, Kansas, to serve as Board Member Pro Tem in place of Gary R. Terrill, who recused himself from this proceeding.

APPEARANCES

Jeffrey B. Tonkin of Kansas City, Missouri, appeared for the claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant was injured in a fall at work on March 13, 2009. The parties disputed whether claimant suffered a K.S.A. 44-510d scheduled disability to his left lower extremity, or a K.S.A. 44-510e whole body impairment to his left hip.

The Administrative Law Judge (ALJ) determined the situs of claimant's injury was his left hip which is compensable as a K.S.A. 44-510e whole person impairment.¹ The evidentiary record contained impairment rating opinions from two doctors and they both rated claimant with a 20 percent impairment to the left lower extremity. The ALJ converted the 20 percent lower extremity rating to an 8 percent functional impairment to the body as a whole. The ALJ further determined claimant was entitled to future medical benefits.²

Respondent requests review of the nature and extent of disability. Respondent argues that claimant suffered a 20 percent permanent partial disability to the leg at the 200-week level. Claimant also requests review of the nature and extent of claimant's disability. Claimant argues that he suffered a 20 percent whole body impairment based upon Dr. Prostic's opinion and it was improper for the ALJ to go outside the record to convert that rating.

The sole issue for Board determination is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Dennis Kuzmic is employed at Staples warehouse location in Edwardsville, Kansas. On March 13, 2009, claimant was performing his stocking job on a catwalk when a rail he was leaning on gave way and he fell about 13 feet landing on his left side on a concrete floor.

An ambulance was summoned by respondent and claimant was taken to the University of Kansas Medical Center. Dr. Archie Heddings, board certified in orthopedic surgery with a subspecialty in trauma, first examined and evaluated claimant on March 14, 2009. Claimant had left hip pain due to a proximal femur fracture. The doctor reviewed claimant's medical records including x-rays. Dr. Heddings then performed an open reduction and internal fixation of claimant's hip fracture. The doctor opined that claimant sustained a three-part intertrochanteric hip fracture. Claimant broke the top portion of his femur which connects to his pelvis.

¹ See K.A.R. 51-7-8(3).

² The award of future medical benefits was not appealed but it should be noted K.S.A 44-510h, as amended effective May 15, 2011, is not applicable to this claim because that provision was not in effect when claimant sustained his accidental injuries on May 13, 2009, and it may not be retroactively applied to this claim as was done by the ALJ. Claimant is entitled to future medical upon application as provided by the law before the May 15, 2011 amendment.

The doctor ordered physical therapy which consisted of gait training and range of motion. Claimant was returned to work as of May 18, 2009. He was to work 4-hour workdays and then increase to 6 hours and then 8 hours.

On June 19, 2009, Dr. Heddings referred claimant to work hardening followed by a functional capacity evaluation (FCE). On August 25, 2009, claimant was released to return to work without restrictions. Then on December 30, 2009, Dr. Heddings determined that claimant had reached maximum medical improvement. Based on the *AMA Guides*³, Dr. Heddings rated claimant with a 20 percent impairment of his left lower extremity. The doctor also testified that claimant may need further surgical intervention which could include implant removal from his hip secondary to the implant irritating the surrounding soft tissue or a total hip replacement secondary to post-traumatic arthrosis.

On November 3, 2010, the ALJ ordered an independent medical examination by Dr. Edward Prostic to determine claimant's functional impairment to his hip or leg which was due to his work-related injury on March 13, 2009. Dr. Prostic performed a physical examination on March 21, 2011, and found claimant had a one-half inch decrease in circumference of the left thigh as compared to the right four inches above the superior pole of the patella. There was minimal loss of internal and external rotation in the flexed position. X-rays revealed solid healing of the intertrochanteric fracture of the left hip supported by a sliding hip screw and plate with auxiliary screws in anatomic position and alignment. But Dr. Prostic noted one of the proximal screws was markedly displaced and the likely source of claimant's complaints of pain in his hip. Based on the *AMA Guides*, Dr. Prostic rated claimant's left lower extremity at 20 percent.

Because of claimant's continued complaints of left hip pain, claimant was examined by Dr. Heddings on April 26, 2011. Upon physical examination, the doctor found that claimant had a screw that was backing out of the greater trochanteric region. On April 29, 2011, Dr. Heddings performed surgery on claimant to remove the screw that was backing out and also removed the other hardware.

On June 7, 2011, claimant had a follow-up appointment with Dr. Heddings. Claimant was doing extremely well so the doctor released him to return to activities as tolerated. On December 20, 2011, claimant was released to return to full-duty work. Dr. Heddings testified that the second surgery to remove the hardware did not change his opinion regarding claimant's functional impairment.

At the time of the regular hearing, claimant had difficulty running, playing with his kids, and pain so he would take Advil. Claimant testified that he has been playing softball occasionally but he is not able to run as fast or as far. Claimant testified that he notices

³American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

when the weather changes his leg and hip hurt. He is not able to squat. Claimant has returned to work with respondent. His job as a clerk requires him to stand eight hours a day which causes problems with his hip.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁵

Initially, it must be determined whether claimant suffered scheduled or non-scheduled injuries as a result of his work-related accident on March 13, 2009. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.⁶ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.⁷ The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁸

The ALJ analyzed the evidence in the following fashion:

Dr. Heddings indicated on a drawing where the fractures occurred and they were right along the base of the femoral neck, which attaches the shaft of the femur to the ball part of the hip ball-and-socket joint. Heddings referred to the injury both as a fracture of the hip and a fracture of the femur. When asked point blank in what part of the body the fractures occurred, the doctor said “the hip, and consequently, the thigh.” The fractures were repaired surgically with hardware, part of which was called a sliding hip screw. This indicated the hardware had to move to accommodate hip joint function. In the report of his independent medical examination, Dr. Prostic consistently referred to the injury as a fracture of the hip.

⁴ K.S.A. 2009 Supp. 44-501(a).

⁵ K.S.A. 2009 Supp. 44-508(g).

⁶ K.S.A. 44-510d; K.S.A. 44-510e.

⁷ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The preponderance of the evidence showed the injury and resulting impairment was to the hip, a nonscheduled injury.⁹

The Board agrees and affirms.

Because claimant suffered an injury to his hip he is entitled to compensation for a whole body disability pursuant to K.S.A. 44-510e.¹⁰ The claimant returned to work for respondent at a salary the same as or more than his pre-injury average weekly wage. Consequently, his compensation is limited to his functional impairment pursuant to K.S.A. 44-510e(a). Functional impairment must, under the Act, be based on the *AMA Guides to the Evaluation of Permanent Impairment* (Fourth Edition). K.S.A. 44-510e.

In this instance, both doctors provided 20 percent functional impairment ratings to claimant's lower extremity. The ALJ took notice of the *AMA Guides* regarding the manner of converting a lower extremity rating percentage to a whole body rating percentage and converted the 20 percent lower extremity rating to an 8 percent whole body rating.

Claimant argues the ALJ went outside the evidentiary record to convert the percentages. The Board disagrees.

The Board has found it acceptable for an ALJ to, on his or her own, consult the appropriate conversion chart which is contained within the *AMA Guides* when the evidence presented at trial contains an impairment rating to one part of the body but which must necessarily be converted in order to appropriately determine the ultimate functional impairment.¹¹ This act of converting one impairment to an upper or lower extremity to that of a whole body is merely ministerial. It involves no independent medical judgment and assuming the conversion chart is appropriately read, the result will be consistent regardless of who performs the conversion. The evidence as to claimant's lower extremity rating is a part of the record. Section 3.2 of the *AMA Guides* specifies that a lower extremity rating is converted to a whole body rating by multiplying 0.4 times the lower extremity rating. The ALJ followed the accepted procedure for converting an extremity rating to a general body rating. In addition, he used the procedure which the legislature in effect approved when it mandated use of the *AMA Guides*. The Board affirms the ALJ's determination claimant is entitled to compensation for an 8 percent whole body functional impairment.

⁹ ALJ Award (Dec. 30, 2011) at 3-4.

¹⁰ K.A.R. 51-7-8(3) states: "An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole."

¹¹ See *McGrady v. Delphi Automotive Systems*, No. 199,358, 1998 WL 229871 (Kan. WCAB Apr. 6, 1998).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 30, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 17th day of May, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey B. Tonkin, Attorney for Claimant, j_tonkin@att.net
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier,
dch@wsabe.com
Kenneth J. Hursh, Administrative Law Judge

¹² K.S.A. 2010 Supp. 44-555c(k).